DEC 15 1972

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

Case No. 72-351

SUSAN MARAMAN,
Petitioner,

vs.

GRADY HARDISTER, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the brief in opposition filed herein by Respondents, the Respondents have raised two arguments for the first time in this Court. The first of such arguments is to the effect that testimony and aerial photographs produced at the trial support conclusions of adequate representation and impracticibility of joinder. (RB 6, 10)[1] If, in fact, the testimony and aerial photographs described by Respondents were capable of informing the trial court as to the size of the alleged class of defendants, this Petitioner obviously would not have contended so strenuously throughout these proceedings that the Respondents utterly failed to demonstrate impracticability of joinder. The only possible conclusion which the trial court could legally have reached on the basis of the testimony and photographs described by Respondents is that the number of trailers in

1. "(RB)" refers to Response to Petition for Writ of Certiorari to the Supreme Court of Florida filed herein by Respondents.

the subdivision in question is at least equal to and probably greater than the number of houses in the subdivision. The important question to be decided by the trial court, however, as to the size of the alleged class of defendants remains unanswered. The Respondents produced no evidence at the trial which would enable the trial court to determine whether the numerous trailers described in the testimony and in the photographs were owned by six persons, twenty persons, or two hundred persons. Similarly, the trial court could not conclude from the evidence whether the lots on which the trailers were located were owned by any certain number of owners. The other category of members of the alleged class of defendants includes lessees of lots on which trailers were located. The trial court likewise had no way of determining the size of this category. In short, no evidence produced at the trial, whether by Respondents or by Petitioner's witnesses, reflects any light whatsoever on the size of the alleged class of defendants.

The second argument raised by Respondents relates to their assertion that the only question of fact involved in the case is the presence or non-presence of trailers or mobile homes on any certain lots within the subdivision. (RB 9, 10) Respondents urge that this simple fact situation enabled the trial court to determine adequate representation. (RB 10)[2]

The fundamental problem with this argument is its bootstrap nature. By carefully selecting particular members of the alleged class of defendants and by naming only

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2. Since Respondents did not plead adequate representation and did not introduce any evidence as to adequate representation and since the mandatory injunction entered by the trial court makes no finding as to adequate representation, there is no indication that the trial court made any determination at all with respect to adequate representation.

those members as parties to the suit, Respondents could cleverly limit the issues raised in the suit. Issues which could have been raised by other members of the alleged class are thus avoided. Particularly in a case such as this in which the members of the alleged class include developers, legal and equitable owners of land, lessees of land, and owners of trailers, it is more than ever essential to protect the due process rights of these diverse groups by requiring a clear demonstration of adequate representation. It is certainly possible that specific unnamed, unknown members of the alleged class of defendants could have defenses such as estoppel or could have had trailers located in the subdivision even prior to the effective date of the restrictive covenants. Regardless, the mandatory injunction entered by the trial court purports to bind all members of the alleged class of defendants without affording them prior notice or an opportunity to present defenses or raise issues other than as described by Respondents.

CONCLUSION

As suggested by Respondents, class actions may be appropriate for resolving problems involving the same questions of law and fact and involving persons with the same community of interest. (RB 11) In the instant case, however, the diverse nature of the members of the alleged class of defendants precludes a community of interest. Moreover, as a result of the lack of notice to the alleged members, it is impossible to determine if the same questions of law and fact would be involved as to each such defendant.

If the instant class action is sustained in the absence of any showing as to impracticability of joinder and ade-

quate representation, to that extent, the constitutional requirement of due process of law becomes meaningless.

For these reasons and for the reasons and authorities contained in our Petition for Writ of Certiorari, we respectfully request that a Writ of Certiorari should issue to review the action and Order of the Supreme Court of Florida herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief in Support of Petition for Writ of Certiorari has been served by mail this 13th day of December, 1972, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida 33601, Attorney for Respondents.

EDWARD M. WALLER, JR.